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October 9, 1997

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FEDERAL COMMUNICATIONS COMMISSION
PAGE OF THE SECRETARY

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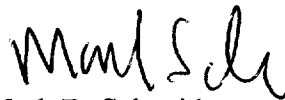
Re: In the matter of Application by Ameritech Michigan Pursuant to Section
271 of the Telecommunications Act of 1996 to Provide In-Region,
InterLATA Services in Michigan, CC Docket No. 97-137

Dear Mr. Caton:

Enclosed for filing in the above-captioned proceeding, please find an original and four copies of "Opposition of MCI Telecommunications Corporation to Petitions for Reconsideration." Also enclosed is an extra copy to be file-stamped and returned.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Mark D. Schneider

Enc.
cc: Service List

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OCT - 9 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

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Application by Ameritech Michigan
Pursuant to Section 271 of the
Telecommunications Act of 1996 to
Provide In-Region, InterLATA
Services in Michigan

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CC Docket No. 97-137

**OPPOSITION OF MCI TELECOMMUNICATIONS CORPORATION
TO PETITIONS FOR RECONSIDERATION**

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October 9, 1997

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
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Application by Ameritech Michigan)	CC Docket No. 97-137
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**OPPOSITION OF MCI TELECOMMUNICATIONS CORPORATION
TO PETITIONS FOR RECONSIDERATION**

MCI Telecommunications Corporation ("MCI") opposes the petitions of BellSouth Corporation, U S West, Inc., and the New York State Department of Public Service ("NYDPS") to reconsider aspects of the order denying Ameritech Michigan's most recent § 271 application. None of petitioners' claims has the least bit of merit; each should be dismissed out of hand.

I. THE COMMISSION'S RULING WAS PROCEDURALLY SOUND.

Petitioners raise baseless procedural objections to the way in which the Commission addressed Ameritech's application. First, the NYDPS and U S West insist that the Commission used its adjudication of Ameritech's application improperly to implement agency rules without appropriate notice and comment. U S West points in particular to places in which the Commission "employs specific, prescriptive and mandatory language" in dicta discussing checklist items. Petn at 8-9. BellSouth suggests more modestly that the Commission "confirm that the Order's guidance about appropriate evidence is just that: guidance." Petn at 18. At the same

time, U S West complains that the Commission did not make dispositive findings on all checklist items and on the public interest test. Petn 5-7.

Petitioners' claims are frivolous. They do not -- and could hardly -- deny that this matter was properly treated as an adjudication by the Agency. Their claim instead is that an agency in an adjudication is not entitled to provide guidance to the regulated community: if a statute requires an applicant to satisfy a 14-point checklist, the agency addressing an application needs to rule on all 14 points, and those rulings need to be principled enough so as to constitute reasoned decision-making, but not so broad such that they could be characterized as "dicta" not strictly necessary to support the agency's conclusion. They point to no authority supporting their argument, and offer no policy justifications that might support it.

Instead, they refer only to a series of entirely unrelated cases discussing the difference between agency rulemaking and agency policy statements. While they note the critical role notice plays in administrative rulemaking, they do not deny that they had all of the notice they needed here. Indeed, each of the petitioners previously filed comments before the agency while this application was pending, raising most of the same issues they raise here. If the Commission had done exactly what they claim it should have done, and issued rulings as to each of the 14 checklist items, petitioners would have had neither more nor less notice than they had here.

The Commission's rejection of Ameritech's application adjudicated Ameritech's claim. It was not a rulemaking. Administrative agencies have broad discretion to act through either rulemaking or through adjudication, SEC v. Chenery Corp., 332 U.S. 194, 202-203 (1947), and petitioners point to no factor that suggests the Commission abused that discretion here. Indeed,

in the only arguably relevant case they cite, National Labor Relations Board v. Wyman-Gordon Co., 394 U.S. 759 (1969), the Court rejected the view that agencies can announce rules of general application only through the rulemaking process. See id. at 777-778 (Douglas, J., dissenting). Here, the Commission's guidance to future applicants (and to those who would oppose future applications) for the most part concerned the kinds of evidence the Commission would find persuasive in determining whether an applicant had or had not carried its burden of proving compliance with the requirements of § 271. The Commission's guidance on these matters is expressly just that: the Commission did not purport to foreclose anyone from making any argument it chooses in the future.

Finally, in this regard, petitioners never explain why it would be better administrative practice for an agency not to offer such guidance. Indeed, in a series of ex parte discussions with the Commission, BOCs urged the FCC to provide just such a "road map," so that they would have a better sense of what was expected of them as they prepared future applications. In truth, it is not the Commission's decision to offer guidance, but the substance of that guidance, that has petitioners upset. Petitioners' suggestion that the Commission was not entitled to make general statements in the course of resolving Ameritech's application is thoroughly frivolous and should be disposed of summarily.¹

¹BellSouth raises an additional evidentiary matter. It suggests that it may be possible for a BOC to prove compliance with § 272 even if it has not attempted to comply with that provision in advance of its application being submitted, since § 271(c)(3)(A)(B) "employs the future tense." Petn at 7. As BellSouth acknowledges, Ameritech purported to show that it had already complied with § 272, and BellSouth does not ask the Commission to reconsider the way in which it addressed Ameritech's evidence. There is accordingly nothing for the Commission to "clarify." There is certainly no reason for the Commission on reconsideration to speculate about whether

II. IN ITS AMERITECH ORDER, THE COMMISSION DID NOTHING INCONSISTENT WITH THE DECISION OF THE EIGHTH CIRCUIT.

U S West and the NYDPS argue that the Commission violated the Eighth Circuit's Iowa Utilities Board decision by stating that applicants that wished to satisfy the checklist pricing requirements had to establish that the checklist elements were available at forward-looking prices. NYDPS Petn at 3-4; U S West Petn at 19-21. U S West adds that the Ameritech Order's discussion of shared transport similarly violates the Eighth Circuit's ruling. Petn at 19-21.

Nothing in the Ameritech Order violated the mandate of the Eighth Circuit. To be sure, U S West and BellSouth asked the Eighth Circuit to rule that the forward-looking pricing principles set forth by the FCC in substance violated the Act, but the court refused to make any such ruling. Instead, that court held that state regulatory commissions arbitrating disputes between the BOCs and their would-be competitors are not bound by Commission rules interpreting the Act's statutory pricing provisions. The Eighth Circuit did not decide -- or even consider -- whether, in resolving § 271 applications, the FCC is bound to accept the judgments of state regulatory commissions concerning the meaning of the statutory pricing provisions.

In its Ameritech Order the Commission considered this issue and correctly concluded that it was not addressing matters resolved by the Eighth Circuit. ¶¶ 283-285. Instead, the Order resolved a different issue: whether Ameritech had met the statutory requirements of § 271. In particular, the Commission did not address what the Eighth Circuit found to be the right of states to reach their own conclusions about the federal pricing rules in resolving arbitration disputes.

different kinds of evidentiary showings might or might not carry an applicant's burden in future applications.

See also Brief of the United States Opposing Petitions For Issuance and Enforcement of the Mandate in Iowa Utils Bd. v. FCC, No. 96-3321, at 10-14 (FCC's Ameritech Order does not violate the court's mandate).

U S West also insists that the Commission's shared transport requirement violates the Eighth Circuit's mandate. Petn at 20-21. But, as MCI explained in more detail in its Opposition to U S West's request for a stay of the Shared Transport Order, U S West's shared transport arguments are, to the contrary, arguments that the Eighth Circuit rejected. The Eighth Circuit rejected U S West's claim that "services" cannot be considered "network elements," and it rejected U S West's claim that new entrants should not be permitted to offer "finished services" wholly through combinations of network elements. The truth is that U S West asked the Eighth Circuit to vacate the shared transport provisions of the Local Competition Order on the same grounds it raises here, and the Eighth Circuit declined to do so. The Commission's shared transport discussion in the Ameritech Order is entirely consistent with its shared transport rules enacted in the Local Competition Order, and so with the Eighth Circuit's decision.²

²BellSouth also asserts that the Commission's statement that LECs had to list all possible LD choices in random order in a joint marketing script is inconsistent with the joint marketing rule set out in the Non-Accounting Safeguards Order, since that order made reference to an ex parte filing which had proposed a different kind of script. Petn 8-10. But the Non-Accounting Safeguards Order clearly requires the listing of IXC's in random order before marketing the § 272 affiliate. Order ¶ 292. That rule is consistent with, and indeed compelled by, the equal access obligations that the 1996 Act expressly preserved (see § 251(g)), and that are unaffected by § 272(g)(3). Moreover, the Commission has determined that non-Bell ILECs that provide local and long-distance service must list all IXC's in random order, Non-Accounting Safeguards Order ¶ 292, and it cannot be that § 272(g)(3) was intended to place BOC's in a favored position compared to ITC's.

Nor do BellSouth's First Amendment concerns merit extended discussion. The

III. THE AMERITECH ORDER DID NOT IMPERMISSIBLY EXTEND THE COMPETITIVE CHECKLIST.

U S West and BellSouth insist that the Commission impermissibly extended the competitive checklist by mandating that BOCs satisfy specified performance standards, and by indicating that the state of local competition is a factor it will consider in applying the public interest test. Petitioners' claims are frivolous.

A. Performance Standards. BellSouth and U S West ask the Commission to reconsider its decision to require Ameritech to maintain OSS performance measurements necessary to enable the Commission to determine if it is providing access and interconnection on "terms and conditions" that are "just, reasonable and nondiscriminatory," as required by the competitive checklist.

In BellSouth's view, the Commission has "confused OSS access with access to the underlying facilities or services CLECs seek," by "requir[ing] Ameritech to provide data on the underlying items requested by means of OSS." Petn at 4. Although it fails to explain how this could be so, BellSouth's concern apparently is that it will be required to provide better functioning OSS to its competitors than it provides to itself, in violation of the Eighth Circuit's admonition that the Act "does not mandate that requesting carriers receive superior quality access to network elements" as compared to what the incumbent itself receives. Iowa Utils. Bd., 1997 U.S. App. LEXIS 18183, at *79. It also expresses concern that FCC regulation of performance

Commission's joint marketing script does not restrict a BOC's ability to disclose truthful information, and does not "deprive the BOCs of a statutorily protected right to engage in joint marketing." Petn at 9, n. 7. Neither are the BOCs being "compelled to convey an antagonistic ideological message." Glickman v. Wileman Bros. & Elliott, 117 S.Ct. 2130, 2139 (1997).

standards will improperly “infringe private negotiations and state authority.” Petn at 5.

But the distinction BellSouth would have the Commission draw between OSS as a network element itself, and OSS as necessary for the provision of other network elements, is both practically and legally irrelevant. The competitive checklist requires access to all network elements (as well as to resold services and interconnection) on conditions that are “just, reasonable and nondiscriminatory.” § 251(c)(2), (3), (4). In its Local Competition Order, as in the Ameritech Order, the Commission ruled that access to OSS is required both because it is itself a network element and because it is necessary to provide “just, reasonable, and nondiscriminatory” access to other network elements. See Local Comp. Order § 517.

The BOCs suggest no reason for the Commission to reconsider its entirely sensible view that checklist implementation requires the BOC to provide proof that it can actually deliver, and actually has delivered, each of the required checklist items in a reasonable and nondiscriminatory manner. Moreover, the Commission was absolutely correct to conclude that OSS includes not only the interface between the BOC and the CLEC, but also the back-end systems that need to be functioning properly once a request is communicated through the BOC’s interface. The challenged statements in the Ameritech Order, such as that “Ameritech must provide to competing carriers access to such OSS functions equal to the access that it provides to its retail operations,” ¶ 166, could not rest on firmer ground, and do not require Ameritech to do more for its competitors than it does for itself, as long as it is providing service on “just and reasonable” terms.

Next, the Commission’s suggestion that Ameritech provide performance data that would

enable the Commission to evaluate whether Ameritech has satisfied its substantive checklist obligations flows directly from the fact that Ameritech has the burden of proof in this proceeding. BellSouth insists that the Commission cannot properly indicate what Ameritech must show to satisfy its burden of proof in a § 271 proceeding, because such questions of proof must be left to private party negotiations or state commission arbitrations. This argument proves only that BellSouth is profoundly confused about the nature of evidentiary proceedings. While it is clear that the Commission has the authority under §§ 251 and 252 to mandate performance standards, the §271 Ameritech Order simply demands that the BOCs meet their burden of proving checklist compliance. If a BOC cannot carry its burden of proving to the FCC that it is providing “just, reasonable, and nondiscriminatory access” to its network, it will not win § 271 authority, and the Commission has every right to demand that BOCs provide adequate performance standards as a precondition to long-distance entry. U S West’s insistence that the Commission not indicate what kinds of proof it expects in this regard, moreover, is completely at odds with its insistence that the Commission has not done enough to tell the BOCs what they need to do in order to receive § 271 authority. In the end, the BOCs’ insistence that they not be required to provide evidence that their OSS actually works, or evidence that they can actually provide their competitors wholesale services, suggests only that nearly a year after they were ordered to do so, the BOCs have not constructed working OSS.

B. The Public Interest Test. Finally, petitioners repeat the arguments they made in their earlier Comments in this proceeding that the Commission should not take the state of local competition into account in applying the public interest test. MCI will not burden the

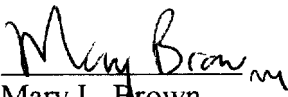
Commission with a detailed reiteration of its response, which is found in its reply comments in this proceeding. See MCI Reply Comments at 11-13. Suffice it to say that the BOCs lobbied hard to have Congress enact this view of the public interest, and Congress refused to do so. The public interest test was added to the law, in addition to the competitive checklist, because Congress “did not know if the checklist [was] going to work. [The public interest test exists] to make certain that in fact we do get competition at the local level.” 141 Cong. Rec. S7942, S7970 (June 8, 1995) (statement of Sen. Kerry). The Conference Committee report itself stressed that in applying the public interest test, regulators properly could consider the state of local competition, and determine whether “there is no substantial possibility that the BOC or its affiliates could use their monopoly power to impede competition in the market such company seeks to enter.” Conf. Rep. No. 104-458, 104th Cong., 2d Sess. at 149 (Jan. 31, 1996). In sum, if Congress wished to prevent the Commission from considering the state of local competition beyond what was specified in the competitive checklist, the public interest test was the very last test it would have enacted.

CONCLUSION

The petitions for reconsideration should be denied.

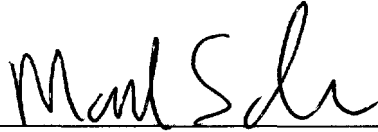
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CERTIFICATE OF SERVICE

I, Mark D. Schneider, hereby certify that on this 9th day of October, 1997, a true and correct copy of the foregoing Opposition of MCI Telecommunications Corporation to Petitions for Reconsideration, was served by hand or by first-class, United States mail, postage prepaid, upon each of the following on the attached service list:

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